

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LISA M. WILTSE,	)	
	)	No. CV-10-00154-CI
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DENYING PLAINTIFF'S
MICHAEL J. ASTRUE,	)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 20.) Attorney Maureen J. Rosette represents Susan I. Conkling (Plaintiff); Special Assistant United States Attorney Brett E. Eckelberg represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment, **DENIES** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) and for Supplemental Security Income (SSI) on June 21, 2006. (Tr. 13; 105.) She alleged she is disabled due to Kyphoscoliosis, scoliosis, along with bulging and narrowing in thoracic spine. (Tr. 95.) Her claim was denied initially and on reconsideration. (Tr.

1 60-63; 66-70.) Plaintiff requested a hearing before an  
2 administrative law judge (ALJ), which was held on June 12, 2008,  
3 before ALJ Paul Gaughen. (Tr. 26-51.) Plaintiff, who was  
4 represented by counsel, and vocational expert Deborah LaPointe  
5 testified at the hearing. (Tr. 32-47; 48-50.) The ALJ denied  
6 benefits on September 3, 2008. (Tr. 13-51.) Later, Plaintiff  
7 submitted new evidence, which the Appeals Council considered, but  
8 ultimately the Council denied review. (Tr. 1-5.) The instant matter  
9 is before this court pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript  
12 of proceedings and are briefly summarized here. At the time of the  
13 hearing, Plaintiff was 28 years old with a high school education.  
14 (Tr. 32; 352.) She lived with her mother, sister and young son.  
15 (Tr. 42.) Plaintiff has past work experiences as a home attendant  
16 aid, a retail cashier, and a fast food worker. (Tr. 33-35.)  
17 Plaintiff testified that she had to stop working full time due to  
18 her back pain. (Tr. 35.) She said she has always had back pain, but  
19 the pain increased after she gave birth. (Tr. 35.) She testified  
20 that she cannot sit in a chair or stand for more than 20 minutes at  
21 a time, due to pain. (Tr. 37.) Plaintiff also asserted that she  
22 has difficulty sleeping more than three and one-half hours per night  
23 due to pain. (Tr. 39.) Plaintiff also said that she works a two-  
24 hour shift, helping a disabled woman with household tasks such as  
25 cleaning her house, shopping and Plaintiff takes her to doctor  
26 appointments. (Tr. 40.) Plaintiff reported that after her shifts,  
27 she has to lie on a heating pad for thirty to sixty minutes due to  
28 back pain. (Tr. 41.)

**STANDARD OF REVIEW**

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If substantial evidence exists to support the administrative findings, or if conflicting evidence exists that will support a finding of either disability or non-disability, the finding of the Commissioner

1 is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
2 1987).

### 3 SEQUENTIAL EVALUATION PROCESS

4 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
5 requirements necessary to establish disability:

6 Under the Social Security Act, individuals who are  
7 "under a disability" are eligible to receive benefits. 42  
8 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
9 medically determinable physical or mental impairment"  
10 which prevents one from engaging "in any substantial  
11 gainful activity" and is expected to result in death or  
12 last "for a continuous period of not less than 12 months."  
13 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
14 from "anatomical, physiological, or psychological  
15 abnormalities which are demonstrable by medically  
16 acceptable clinical and laboratory diagnostic techniques."  
17 42 U.S.C. § 423(d)(3). The Act also provides that a  
18 claimant will be eligible for benefits only if his  
19 impairments "are of such severity that he is not only  
20 unable to do his previous work but cannot, considering his  
21 age, education and work experience, engage in any other  
22 kind of substantial gainful work which exists in the  
23 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
24 the definition of disability consists of both medical and  
25 vocational components.

17 The Commissioner has established a five-step sequential  
18 evaluation process for determining whether a person is disabled. 20  
19 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
20 137, 140-42 (1987). In steps one through four, the burden of proof  
21 rests upon the claimant to establish a prima facie case of  
22 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
23 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
24 establishes that a medically determinable physical or mental  
25 impairment prevents her from engaging in her previous occupation.  
26 20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the  
27 presentation of 'complete and detailed objective medical reports of  
28 his condition from licensed medical professionals.'" *Meanel v.*

1 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999).

2 If a claimant cannot do her past relevant work, the ALJ  
3 proceeds to step five, and the burden shifts to the Commissioner to  
4 show that (1) the claimant can make an adjustment to other work; and  
5 (2) specific jobs exist in the national economy which claimant can  
6 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*  
7 *Heckler*, 722 F.2d 1496, 1497-98 (9<sup>th</sup> Cir. 1984).

8 **ALJ'S FINDINGS**

9 At step one of the sequential evaluation process, the ALJ found  
10 Plaintiff has not engaged in substantial gainful activity since  
11 March 17, 2006, the alleged onset date. (Tr. 15.) At step two, he  
12 found Plaintiff has the following severe impairments: dorsal  
13 kyphosis (with a clinical estimate of 15-30 degrees anterior  
14 deformity and an "S" shaped scoliosis), but with no signs of  
15 radiculopathy. (Tr. 15.) At step three, the ALJ found Plaintiff  
16 does not have an impairment or combination of impairments that meets  
17 or medically equals one of the listed impairments in 20 C.F.R. Part  
18 404, Subpart P, Appendix 1 (20 CFR §§ 404.1520(d), 404.1525,  
19 404.1526, 416.920(d), 416.925 and 416.926). (Tr. 18.) At step four,  
20 he found Plaintiff has the residual functional capacity to perform  
21 the full range of "medium work" as defined in 20 C.F.R. §  
22 404.1567(c) and § 416.967(c), except she "would have slight mental  
23 limitations in basic work functions in terms of concentration and  
24 attentiveness, social interaction, and adaptive capacity. With some  
25 adjustment for alternating, the claimant could work 8 hours of an 8  
26 hour day with allotted normal breaks." (Tr. 18.) The ALJ found  
27 Plaintiff is capable of performing past relevant work as a home  
28 attendant aid. (Tr. 24.)

**ISSUES**

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when he: (1) found her testimony was not credible; (2) rejected the opinion of Shawn Horn, Psy.D., LMHC; and (3) failed to find that she had a severe mental health impairment. Plaintiff also contends remand is necessary for the consideration of new mental health records obtained after the ALJ's decision was rendered, but that was reviewed by the Appeals Council. (ECF No. 14 at 9-18.) Defendant argues the ALJ properly considered the opinion evidence, the ALJ correctly concluded Plaintiff is not disabled, and the new evidence does not undermine the ALJ's conclusions. (ECF No. 21 at 3-20.)

**DISCUSSION****1. Credibility.**

Plaintiff contends that the ALJ did not properly credit her testimony regarding her limitations from her back pain. (ECF No. 14 at 9.) The Plaintiff alleges that the ALJ did not specify why her testimony regarding her limited abilities and her need to rest upon a heating pad up to three times per day was not credible. (ECF No. 14 at 11.)

When the ALJ finds a claimant's statements as to the severity of impairments, pain, and limitations are not credible, the ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude the ALJ did not arbitrarily discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991) (en banc). If no affirmative evidence exists that

1 the claimant is malingering, the ALJ must provide "clear and  
2 convincing" reasons for rejecting the claimant's allegations  
3 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d  
4 715, 722 (9<sup>th</sup> Cir. 1998). The ALJ engages in a two-step analysis in  
5 deciding whether to admit a claimant's subjective symptom testimony.  
6 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the  
7 first step, the ALJ must find the claimant has produced objective  
8 medical evidence of an underlying "impairment," and that the  
9 impairment, or combination of impairments, "could reasonably be  
10 expected to produce pain or other symptoms." *Cotton v. Bowen*, 799  
11 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1986). Once the *Cotton* test is met, the  
12 ALJ must evaluate the credibility of the claimant.

13 In evaluating credibility, the ALJ may consider an unexplained  
14 failure to follow treatment recommendations and testimony by the  
15 claimant "that appears less than candid." *Tommasetti v. Astrue*, 533  
16 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2008). Also, the ALJ may consider the lack  
17 of consistent treatment, or an "unexplained or inadequately  
18 explained, failure to seek treatment or follow a prescribed course  
19 of treatment" can cast doubt on a claimant's sincerity. *Fair v.*  
20 *Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989); *Burch v. Barnhart*, 400  
21 F.3d 676, 681 (9<sup>th</sup> Cir. 2005). The type, dosage, effectiveness and  
22 side effects of medication taken to alleviate pain or other symptoms  
23 is relevant in evaluating the intensity and persistence of symptoms.  
24 20 C.F.R. §§ 416.929(c)(3)(iv) and 416.929.(c)(3)(v).

25 In this case, Plaintiff alleged that the severity of her back  
26 pain prevented her from working. The ALJ found Plaintiff's  
27 statements concerning the intensity, persistence and limiting  
28 effects of her symptoms were not credible. (Tr. 21.) In discounting

1 Plaintiff's pain complaints, the ALJ relied primarily upon the  
2 inconsistencies between Plaintiff's testimony at the hearing, her  
3 application, and her complaints to her health care providers. (Tr.  
4 21-22.) Additionally, the ALJ noted Plaintiff exhibited drug-  
5 seeking behavior in 2006-2007. (Tr. 21-22.) The ALJ also relied  
6 upon Plaintiff's reports to her physician that as a result of the  
7 fentanyl patch, her symptoms were significantly improved. (Tr. 22.)  
8 Finally, the ALJ contrasted Plaintiff's testimony about the severity  
9 of the pain with her daily activities. (Tr. 22.)

10 In finding the Plaintiff minimally credible, the ALJ provided  
11 several specific, "clear and convincing"<sup>1</sup> reasons for rejecting the  
12 claimant's allegations regarding the severity of symptoms that are  
13 amply supported by the record. For example, in the hearing on June  
14 12, 2008, Plaintiff testified that due to her pain, she can sit for  
15 only 20 minutes and stand for about 20 minutes. (Tr. 37.) She said  
16 if she had to go up and down stairs everyday, it would be  
17 "excruciating." (Tr. 38.) She asserted that her pain requires that  
18 she lie down daily on a heating pad for thirty minutes up to three  
19 times per day to alleviate her pain. (Tr. 41.)

20 In January, 2006, Plaintiff underwent several sessions of  
21 physical therapy for her back pain. (Tr. 234-55.) She reported  
22 that the TENS unit was effective in helping with pain relief, and  
23 she reported she was improving. (Tr. 235; 238; 254.) Also, in  
24 March 2007, Plaintiff asked her treating physician Dr. Monroe for a  
25 fentanyl patch. (Tr. 288.) Later that month, Plaintiff told Dr.  
26 Monroe that the fentanyl patch controlled her pain and she wanted to

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28 <sup>1</sup> *Reddick*, 157 F.3d at 722.



1 return to work. (Tr. 288.) In June 2007, Plaintiff told Dr. Monroe  
2 that she was pleased with how the patch was "letting her lead a more  
3 normal life." (Tr. 289.) The following month, Plaintiff continued  
4 to do well with the patch. (Tr. 289.) In late August, 2007, the  
5 fentanyl patch was still controlling her pain. (Tr. 290.) In  
6 September 2007, eight months prior to the hearing, Plaintiff  
7 presented "no particular complaints" to her physician. (Tr. 291.)  
8 The record contains only two chart notes from 2008, both from  
9 January. Plaintiff sought treatment because she reported she lifted  
10 a 68-pound wheelchair at work, and her back "flared up." (Tr. 318.)  
11 Dr. Monroe opined that Plaintiff was seeking a stronger patch, but  
12 instead of acquiescing, he advised her to stop abusing her back.  
13 (Tr. 318.) No additional chart notes for 2008 from Dr. Monroe  
14 appear in the record, and there is no evidence in the record to  
15 indicate fentanyl stopped effectively controlling Plaintiff's back  
16 pain.

17 Additionally, the record supports the ALJ's findings that  
18 Plaintiff exhibited drug-seeking behavior. See *Edlund*, 253 F.3d at  
19 1157 (ALJ properly considered claimant's drug-seeking behavior). For  
20 example, in September 2006, Dr. Monroe told Plaintiff that he would  
21 not prescribe narcotic pain medicine without an agreement from a  
22 pain specialist. (Tr. 274.) In the chart notes, Dr. Monroe added:  
23 "It should be noted that, despite her saying that she has severe and  
24 unremitting pain, she really doesn't demonstrate any pain behavior  
25 in the office." (Tr. 274.) On February 1, 2007, Plaintiff returned  
26 to Dr. Magnuson's office at the Pain Management Clinic of North  
27 Idaho, and reported that she was in excruciating pain after a  
28

1 steroid injection. She requested Oxycontin. The nurse practitioner  
2 indicated she was unwilling to prescribe Oxycontin under the  
3 circumstances. (Tr. 300.) Two days later Plaintiff arrived at the  
4 Valley Hospital emergency room complaining of severe pain, and she  
5 obtained both an injection of, and a prescription for, morphine.  
6 (Tr. 303.)

7 Finally, the ALJ's reason for finding diminished credibility  
8 based on Plaintiff's reported inconsistent daily activities is also  
9 supported by the record. The ALJ thoroughly reviewed Plaintiff's  
10 claims that she was incapable of performing basic household tasks  
11 and contrasted these claims with Plaintiff's admitted inconsistent  
12 activities. For example, Plaintiff asserted she could not lift her  
13 two-year old son into his car seat, but she admitted that she lifted  
14 a 68-pound wheelchair as part of her job. (Tr. 42; 318.) Also, as  
15 of late August 2007, the fentanyl patch controlled her pain. (Tr.  
16 290.) No credible evidence exists in the record that the fentanyl  
17 patch stopped working effectively. As of late January 2008,  
18 Plaintiff was still refilling the fentanyl prescription. (Tr. 318.)

19 Plaintiff testified in June 2008 that she was in severe pain  
20 after working two hours, complaints similar to those lodged in an  
21 undated Disability Report.<sup>2</sup> (Tr. 95.) At the hearing, she admitted  
22 the patch helped, but asserted it was not enough: "The fentanyl?  
23 Yeah, it does help, but there is also a lot of breakthrough pain  
24 with it." (Tr. 43.) Because no treatment notes exist after January  
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26 <sup>2</sup>"I am in constant pain. I am unable to make it through a  
27 whole day of work without being in a whole lot of pain." (Tr. 95.)  
28

1 2008 related to break-through pain, it is reasonable to conclude  
2 that Plaintiff's pain was not severe enough to require additional  
3 treatment.

4 The record supports the ALJ's specific, "clear and convincing"<sup>3</sup>  
5 reasons that provide the basis for Plaintiff's diminished  
6 credibility. The ALJ did not err by discrediting Plaintiff's pain  
7 complaints.

8 **2. Shawn Horn, Psy.D., LMHC.**

9 Plaintiff argues that the ALJ failed to set forth the  
10 appropriate reasoning for rejecting Dr. Horn's opinion. (ECF No. 14  
11 at 16; ECF No. 22 at 3.) In disability proceedings, a treating  
12 physician's opinion carries more weight than an examining  
13 physician's opinion, and an examining physician's opinion is given  
14 more weight than that of a non-examining physician. *Benecke v.*  
15 *Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81  
16 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If the treating or examining  
17 physician's opinions are not contradicted, they can be rejected only  
18 with "clear and convincing" reasons. *Lester*, 81 F.3d at 830. If  
19 contradicted, the opinion can only be rejected for "specific" and  
20 "legitimate" reasons that are supported by substantial evidence in  
21 the record. *Andrews*, 53 F.3d at 1043.

22 Social Security Rules expressly require a treating source's  
23 opinion on an issue of a claimant's impairment be given controlling  
24 weight if it is well-supported by medically acceptable clinical and  
25 laboratory diagnostic techniques and is not inconsistent with the

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27 <sup>3</sup> *Reddick*, 157 F.3d at 722.

1 other substantial evidence in the record. 20 C.F.R. §  
2 404.1527(d)(2). If a treating source's opinion is not given  
3 controlling weight, the weight that it will be given is determined  
4 by length of the treatment relationship, frequency of examination,  
5 nature and extent of the treatment relationship, relevant evidence  
6 supporting the opinion, consistency with the record as a whole, and  
7 the source's specialization. *Id.*

8 Relevant factors in evaluating a medical opinion are the amount  
9 of evidence supporting the opinion and the quality of the  
10 explanation provided in the opinion. *Lingenfelter v. Astrue*, 504  
11 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631  
12 (9th Cir. 2007). An ALJ may discredit treating physicians' opinions  
13 that are conclusory, brief, and unsupported by the record as a whole  
14 or by objective medical findings. *Batson v. Comm'r, Soc. Sec.*  
15 *Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). A medical opinion may  
16 be rejected if it is based on a claimant's subjective complaints  
17 which were properly discounted. *Tonapetyan v. Halter*, 242 F.3d  
18 1144, 1149 (9th Cir. 2001); *Fair*, 885 F.2d at 604.

19 In this case, the ALJ gave little weight to Dr. Horn's  
20 diagnosis, because she conducted no objective tests or mental exams.  
21 Instead, Dr. Horn relied exclusively upon Plaintiff's self-reports  
22 of her mental problems. Since Plaintiff was determined to be not  
23 credible, opinions based primarily on Plaintiff's own complaints are  
24 of reduced value. Also, no objective medical evidence exists that  
25 supports Dr. Horn's diagnoses of post-traumatic stress and chronic,  
26 severe depression. It also appears Dr. Horn failed to examine  
27 Plaintiff's medical records before arriving at a diagnosis.

1 Finally, Dr. Horn treated Plaintiff for a short time period, from  
2 May 21, 2008, through June 18, 2008. (Tr. 321-34.)

3 In sum, Dr. Horn's opinion was not based upon medically  
4 acceptable clinical and diagnostic techniques. Dr. Horn's medical  
5 opinion is conclusory, her chart notes are check-the-boxes, the  
6 notations are brief, and the diagnoses are unsupported by the  
7 objective medical findings. As such, the ALJ properly gave little  
8 weight to Dr. Horn's opinion.

9 Notably, the ALJ found that Dr. Horn was an "unacceptable  
10 medical source." (Tr. 23.) Under 20 C.F.R. § 404.1513(a)(2),  
11 acceptable medical sources include "[l]icensed or certified  
12 psychologists." The ALJ stated that Dr. Horn was a "licensed mental  
13 health counselor, not a licensed psychologist." (Tr. 17.) Dr. Horn  
14 possesses a Psy.D. degree, which is a professional, doctorate degree  
15 in psychology.<sup>4</sup> A doctorate degree in psychology is the equivalent  
16 of a "certified psychologist" and thus the ALJ's conclusion that Dr.  
17 Horn was not an acceptable medical source was error.

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18  
19 <sup>4</sup><http://www.apa.org/education/grad/fags.aspx?item=6>. According  
20 to the American Psychology Association, "the PsyD, first awarded in  
21 the late 1960s but increasing in popularity among professional  
22 independent programs, is a professional degree in psychology  
23 (similar to the MD in medicine). Programs awarding the Psy.D. place  
24 major emphasis on preparing their graduates for professional  
25 practice as practitioner-scholars but typically with less extensive  
26 research training." *Id.*

1 An ALJ's reliance upon an invalid reason in determining  
2 credibility will be deemed harmless where substantial evidence  
3 exists that supports the ALJ's conclusions on credibility and the  
4 error does not negate the validity of the ALJ's ultimate credibility  
5 conclusion. *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d  
6 1155, 1162 (9<sup>th</sup> Cir. 2008); *Batson*, 359 F.3d at 1195-97 (applying  
7 harmless error standard where one of the ALJ's several reasons  
8 supporting an adverse credibility finding was held invalid); see  
9 also *Stout*, 454 F.3d at 1055 (defining harmless error as such error  
10 that is "inconsequential to the ultimate nondisability  
11 determination").

12 In this case, the ALJ's invalid reason - that Dr. Horn was an  
13 unacceptable medical source - was inconsequential to the  
14 determination of Plaintiff's credibility, and thus was harmless  
15 error.

### 16 **3. Step Two Impairment**

17 At step two, the claimant bears the burden of demonstrating a  
18 severe, medically determinable impairment that meets the duration  
19 requirement. 20 C.F.R. § 404.1520(a)(4)(ii); *Bowen*, 482 U.S. at 146  
20 n.5. To satisfy the duration requirement, the severe impairment  
21 must have lasted or be expected to last for a continuous period of  
22 not less than 12 months. *Bowen*, 482 U.S. at 140. The impairment  
23 "must be established by medical evidence consisting of signs,  
24 symptoms, and laboratory findings, not only by [the claimant's]  
25 statement of symptoms." 20 C.F.R. § 404.1508; 20 C.F.R. § 416.908.  
26 "[T]he impairment must be one that 'significantly limits [the  
27 claimant's] physical or mental ability to do basic work  
28

1 activities.'" *Bowen*, 482 U.S. at 154 n.11 (quoting 20 C.F.R. §  
2 404.1520(c)); see also *Smolen*, 80 F.3d at 1290 ("[A]n impairment is  
3 not severe if it does not significantly limit [the claimant's]  
4 physical ability to do basic work activities").

5 The ALJ found that Plaintiff's recently diagnosed depression,  
6 post traumatic stress disorder and major depressive disorder are  
7 non-severe. (Tr. 17.) The ALJ noted that no onset date for these  
8 disabilities was provided, and over the years, Plaintiff has  
9 registered only vague mental health complaints with her doctors.  
10 Additionally, the ALJ gave little weight to Dr. Horn's last-minute  
11 opinion because it was based solely upon Plaintiff's self-reports.  
12 (Tr. 23.) The ALJ noted that Plaintiff underwent five counseling  
13 sessions, and was transferred to Spokane Mental Health, but no  
14 evidence exists in the record that she continued treatment. (Tr.  
15 17.)

16 Also, in determining that Plaintiff's mental impairments were  
17 not severe, the ALJ considered the following functional areas:  
18 activities of daily living, social functioning, concentration,  
19 persistence or pace, and decompensation. The ALJ found that  
20 Plaintiff would experience only mild or no limitations, and she had  
21 not experienced decompensation. (Tr. 17-18.)

22 The record supports the ALJ's conclusions. Plaintiff reported  
23 that the onset date for her severe psychological symptoms was in  
24 2002, but these symptoms were notably absent from her disability  
25 report. (Tr. 95.) Prior to May, 2008, Plaintiff lodged few  
26 complaints related to depression, and the record reveals anti-  
27 depressants alleviated the symptoms. Impairments that can be  
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1 controlled effectively with medication are not disabling. *Warre v.*  
2 *Commissioner of Social Security*, 439 F.3d 1001 (2006); *Odle v.*  
3 *Heckler*, 707 F.2d 439, 440 (9th Cir. 1983) (affirming denial of  
4 benefits and noting that the claimant's impairments were responsive  
5 to medication). For example, in December, 2006, Plaintiff reported  
6 to Dr. Monroe that Paxil had improved her mood. (Tr. 275.) In July  
7 2007, Plaintiff switched to Wellbutrin, which similarly improved her  
8 energy level and desire to engage. (Tr. 289.) Plaintiff did not  
9 complain of debilitating mental impairments until about one month  
10 prior to the ALJ hearing. (Tr. 335.)

11 The record does not establish that Plaintiff suffered from a  
12 severe, medically determined mental impairment that lasted a  
13 continuous period of at least 12 months. In the absence of this  
14 evidence, the ALJ properly found that Plaintiff had no severe mental  
15 impairments at step two.

16 **4. New Evidence.**

17 In the Ninth Circuit, when the Appeals Council specifically  
18 considers new materials in the context of denying a claimant's  
19 request for review, "we consider the rulings of both the ALJ and the  
20 Appeals Council," and the record includes the ALJ's decision as well  
21 as the new evidence. *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir.  
22 1996); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993). If  
23 the new evidence shows a reasonable possibility exists that it would  
24 change the outcome of the ALJ's determination, then remand is  
25 appropriate to allow the ALJ to consider the evidence. *Mayes v.*  
26 *Massanari*, 276 F.3d 453, 462 (9th Cir. 2001). Evidence obtained  
27 after the ALJ has issued an adverse determination is less  
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1 persuasive. *Weetman v. Sullivan*, 877 F.2d 20, 23 (9<sup>th</sup> Cir. 1989).  
2 Additionally, after-the-fact psychiatric findings are "notoriously"  
3 unreliable. See *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9<sup>th</sup> Cir.  
4 1984).

5 Because the Appeals Council considered Plaintiff's new mental  
6 health records, the new evidence is part of the record on review by  
7 this court. (Tr. 5.) Plaintiff argues that newly admitted evidence  
8 undermines the ALJ's decision and establishes that her mental  
9 impairment is severe. (ECF No. 14 at 18-19.) The issue is whether  
10 the ALJ's decision is supported by substantial evidence after  
11 considering the new evidence. The new evidence submitted to the  
12 Appeals Council consisted of: (1) a July 2008 letter from Dr.  
13 Monroe; (2) an October 2008 psychological evaluation by Dennis R.  
14 Pollack, Ph.D., and (3) an October 2008 Mental Medical Source  
15 Statement. (Tr. 5; 349-61.)

16 Dr. Monroe's July 17, 2008, letter does not provide evidence of  
17 a "reasonable possibility" that would change the ALJ's decision.  
18 Dr. Monroe's letter opines that Plaintiff is "disabled for anything  
19 other than sedentary work." (Tr. 349.) While a treating  
20 physician's evaluation of a patient's ability to work may be  
21 suggestive of useful information, the determination of a disability  
22 is for the ALJ to decide. *McLeod v. Astrue*, 640 F.3d 881, 885 (9<sup>th</sup>  
23 Cir. 2011). In this case, Dr. Monroe's opinion related to  
24 Plaintiff's disabled status, or her ability to perform only  
25 sedentary work is not evidence that presents a reasonable  
26 probability of changing the ALJ's decision.

27 The remainder of the new evidence is from Dr. Pollack, and  
28

1 consists of a psychological assessment and a mental medical source  
2 statement. (Tr. 351-61.) Dr. Pollack's single psychological  
3 assessment occurred on October 7, 2008, one month after the ALJ's  
4 adverse opinion. Dr. Pollack noted that Plaintiff's clinical scores  
5 reveal she had difficulty managing her anxiety, and she had "very  
6 high levels of anxiety, worry and when out of control, paranoid  
7 ideation. She lives in constant fear." (Tr. 356.) Dr. Pollack  
8 concluded that while additional testing needed to be completed,<sup>5</sup>  
9 Plaintiff's test results suggested a neuropsychological deficit.<sup>6</sup>  
10 (Tr. 357.)

11 Dr. Pollack's analysis does not present evidence that poses a  
12 reasonable possibility of changing the ALJ's determination. First,  
13 Dr. Pollack examined Plaintiff well after the ALJ's adverse  
14 determination, and thus is less persuasive. *Weetman*, 877 F.2d at  
15 23. In addition, Dr. Pollack related that Plaintiff's testing was  
16 incomplete. (Tr. 361.) Moreover, the report does not establish the  
17 onset date of Plaintiff's post-traumatic stress and obsessive  
18 compulsive disorders and, thus, is it impossible to determine if  
19

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20 <sup>5</sup>Dr. Pollack explained that Plaintiff arrived at one out of her  
21 three scheduled interviews with him. Plaintiff was scheduled for  
22 additional testing, and she was to complete a second personality  
23 test and neurological tests, but she did not make it to her  
24 appointment. (Tr. 361.)

25 <sup>6</sup>Dr. Pollack also noted that Plaintiff was receiving treatment  
26 from Brandy Realkoff at Spokane Mental Health. (Tr. 353.) No  
27 records from Spokane Mental Health were submitted.  
28

1 these alleged disorders meet the durational requirements or existed  
2 during the relevant period. (Tr. 357.) Significantly, this is the  
3 only diagnosis of obsessive-compulsive disorder appearing in the  
4 record. Finally, Dr. Pollack's assessment was that Plaintiff was  
5 mildly impaired. For example, in the mental medical source  
6 statement, Dr. Pollack assessed Plaintiff with no severe  
7 limitations, and only one marked and one moderate limitation. (Tr.  
8 359.) Neither the assessment nor the report provide conclusive,  
9 objective medical evidence that Plaintiff has severe mental  
10 impairments of the duration and severity required for a finding of  
11 disability. As a result, this new evidence does not present a  
12 reasonable possibility that would change the ALJ's decision.  
13 Despite the new evidence, the ALJ's decision that Plaintiff is not  
14 disabled is supported by substantial evidence.

#### 15 CONCLUSION

16 The Commissioner's determination of non-disability is supported  
17 by substantial evidence and free of legal error. Accordingly,

18 1. Defendant's Motion for Summary Judgment (**ECF NO. 20**) is  
19 **GRANTED.**

20 2. Plaintiff's Motion for Summary Judgment (**ECF NO. 13**) is  
21 **DENIED.**

22 The District Court Executive is directed to file this Order and  
23 provide a copy to counsel for Plaintiff and Defendant. Judgment  
24 shall be entered for Plaintiff, and the file shall be CLOSED.

25 DATED October 4, 2011.

26 S/ CYNTHIA IMBROGNO  
27 UNITED STATES MAGISTRATE JUDGE  
28